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A CRITICAL ANALYSIS OF GOVERNMENT
PROCUREMENT PROCEDURES RELATIVE
TO DISPOSITION OF BID PROTESTS

by

Donald Harry Giffin



A CRITICAL ANALYSIS OF GOVERNMENT PROCUREMENT PROCEDURES
RELATIVE TO DISPOSITION OF BID PROTESTS

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CHAPTER I

INTRODUCTION

Subject Background

During recent years the United States has experienced a dramatic increase in Government spending. Expanding military requirements, new space programs, and increased domestic programs, as well as other federally sponsored projects too numerous to mention, have forced the federal budget to a level approximating \$185 billion with budget projections indicating a possible level of \$195 billion by 1971.¹

To visualize the increase in federal spending it is only necessary to compare present levels with those of previous years. The federal budget proposed for fiscal year 1969 contained an increase of \$13.1 billion, in actual expenditures, over fiscal year 1968 expenditures.² The budget included approximately \$79.8 billion for national defense.³ This figure evidences a large increase over the \$40-billion range experienced in 1961 and 1962 for national defense.⁴

¹"Laying Out the Choices Nixon Faces," Business Week, November 30, 1968, p. 126.

²1969 Collier's Encyclopedia Yearbook (New York: Crowell-Collier Educational Corporation, 1969), p. 598.

³Ibid.

⁴"Critics Fire at Military Budget," Business Week, February 15, 1969, p. 116.



As the volume of Government expenditures has increased, the volume of Government procurements has increased. Increased procurements have resulted in an increasing need for methods and procedures which provide controls adequate to ensure integrity in the procurement system. One method which has developed in this area is the protest of award, or bid protest.

An unsuccessful bidder for a Government contract may express his objections to a proposed contract award or to an award already made if he believes Government procurement regulations have not been adhered to or have been violated. The bid protest concept provides a service to both the unsuccessful bidder and to the Government. Unsuccessful bidders are provided an avenue to express objections, which they would not otherwise have. This is necessarily true as the bidders have not been permitted to contest the awards of contracts in the courts.⁵ Simultaneously, the concept provides a means by which the Government may locate and correct errors and abuses in the award of Government contracts.

Bid protest procedures are not explicitly provided for by statute; however, relevant procedures have been developed by the Comptroller General as well as by Government departments and agencies. The Comptroller General, in developing bid protest procedures, has claimed his authority

⁵J. E. Welch, "The GAO in Government Procurement," Federal Bar Journal, XIV (February, 1954), 327.



lies in his obligation to ascertain whether appropriations are correctly expended.⁶ Utilizing this claimed authority, the Comptroller General published comprehensive protest procedures as late as 1968.⁷

Without citing a specific authority, Government departments and agencies have developed and published bid protest procedures pertinent to their own areas. The most basic procedures relative to bid protests have been published by the Department of Defense and the General Services Administration and are contained in the Armed Services Procurement Regulations⁸ and the Federal Procurement Regulations⁹ respectively. The Armed Services Procurement Regulations are applicable to all Department of Defense activities and the Federal Procurement Regulations to most other federal executive agencies. Implementing instructions have been prepared at various levels within the departments and agencies.

⁶"The Comptroller General of the United States: The Broad Power to Settle and Adjust All Claims and Accounts," Harvard Law Review, LXX (December, 1956), 357.

⁷U.S., Comptroller General, "Title 4--Accounts," Federal Register, XXXIII, No. 171 (August 31, 1968), 12288.

⁸U.S., Department of Defense, Armed Services Procurement Regulations (Washington, D.C.: Government Printing Office, 1969), pars. 2-407.9, 3-509.

⁹U.S., General Services Administration, Federal Procurement Regulations (2d ed.; Washington, D.C.: Government Printing Office, 1964), par. 1-2.407.8.



Research Questions and Methodology

The utilization of the bid protest concept by an unsuccessful bidder, and the resulting protest decision rendered, has a certain impact on the involved Government program, on the protestant, and, in some cases, on the contract awardee. The objective of this project is to determine whether Government procedures relative to pre-award and post-award bid protests ensure fairness and reasonableness in terms of this impact on the involved programs and parties.

In searching for an answer to the question it will first be necessary to determine the extent to which the concept is properly utilized by industry and also to consider the procedures established for submission, consideration, and final determination of bid protests. Additionally, it will be necessary to establish the basic considerations involved in rendering protest decisions and the consistency of those decisions. Finally, it will be necessary to determine the nature of the impact on involved programs and parties.

In conducting the necessary research, primary emphasis will be placed on published Government procedures relative to bid protests. Aside from published procedures, very little has been written in the area of study. It is anticipated that the void created by a lack of written material will be filled through information gained from



interviews with Government contracting officers and legal personnel. A large portion of the material will be drawn from Comptroller General decisions, both published and unpublished.

Presentation of the material will proceed from a discussion relative to the use of the protest concept by industry through an analysis of protest procedures and protest decisions to a study of the impact of protest decisions on involved programs and parties. A final presentation will consist of conclusions and certain recommendations relative to protest procedures.

Scope of the Study

Bid protests, for purposes of this project, will be defined as a protest against award of a contract, resulting from either a formally advertised or a negotiated procurement. Protests against a firm's small business status will be excluded as they do not fit the accepted definitions of a bid protest.

The vastness of the bid protest concept precludes a study of all levels of Government procurement, and for this reason the study will be limited to the Department of Defense and the General Accounting Office. It is realized that protestants may protest to Congressional levels when challenging Department of Defense procurements; however, it is not the intent of this paper to discuss protests to Congressional levels.



When discussing protests within the Department of Defense, the Departments of the Army, Navy, and Air Force as well as the Defense Supply Agency will be considered. Realizing that it is not feasible to survey and discuss each sub-agency within the Departments mentioned, only a limited sample of smaller field activities will be considered.

Prior to commencing this project it is necessary to define the intended meanings of the words "fairness" and "reasonableness" as used in this paper. The definitions used will be those given in Webster's New World Dictionary: fairness "implies the treating of both or all sides alike, without reference to one's own feelings or interests"; reasonableness implies "amenable to reason; just."



CHAPTER II

BID PROTEST CONCEPT UTILIZATION BY INDUSTRY

Contractor Intent in Submission of Bid Protests

The bid protest concept offers an invitation for any unsuccessful bidder to challenge any determination that is made in the course of awarding a contract. Bidders for Government contracts have the right to require Government agencies to follow their regulations in the formation of contracts and the method by which this right is exercised is the bid protest.¹ In view of this approach it appears logical to believe an unsuccessful bidder will submit a bid protest when he believes the Government contracting officer has deviated from established regulations. It is further logical to believe the bidder expects an unbiased evaluation of his protest and a subsequent adjustment which will align the contract award with established regulations and possibly facilitate his receiving the award.

Interviews with various Government officials and contractor representatives indicate the logical intent is not necessarily the primary factor in protest submission. One Government lawyer has indicated that he believes many

¹Robert D. Witte, "Protesting the Award of Government Contracts," Practical Lawyer, March, 1966, p. 59.



unsuccessful bidders protest awards without valid justification in order to delay the procurement, while hoping for some unforeseen development which will void the expected contract award. The lawyer further indicated that in several cases of which he has knowledge the protestant could not state any deviation from the regulations and in these cases did little more than indicate he was protesting the award.²

The above belief was supported by an Assistant General Counsel of the General Accounting Office, who indicated he had received many protests in which the protestant did not and could not state a reason for the protest. He also attributed this action to a desire on the part of the protestant to unjustly delay the contract award. He further indicated several protestants had informed him that they protested in an effort to force changes to existing regulations.³ Those protests as lodged did not point out deviations from existing regulations but did attempt to justify the protestant's bidding actions and force a change in regulations to coincide with the protestant's bid procedures. This action was carried out in anticipation of future awards and not in anticipation of receiving the protested contract award.

²G. Quigley, U.S. Naval Air Systems Command, Washington, D.C., interview, May, 1969.

³S. Haycock, General Accounting Office, Washington, D.C., interview, May, 1969.



A statement by a contractor representative tends to lend credibility to the above mentioned ideas. One attorney, who is actively engaged in preparing and presenting bid protests for contractor clients, indicated that he and the clients, in many cases, knew the protests were not valid; however, it was believed that if a contractor protested enough times the Government contracting officer would, in an act of conscience, give special consideration to the protesting contractor in future transactions.⁴

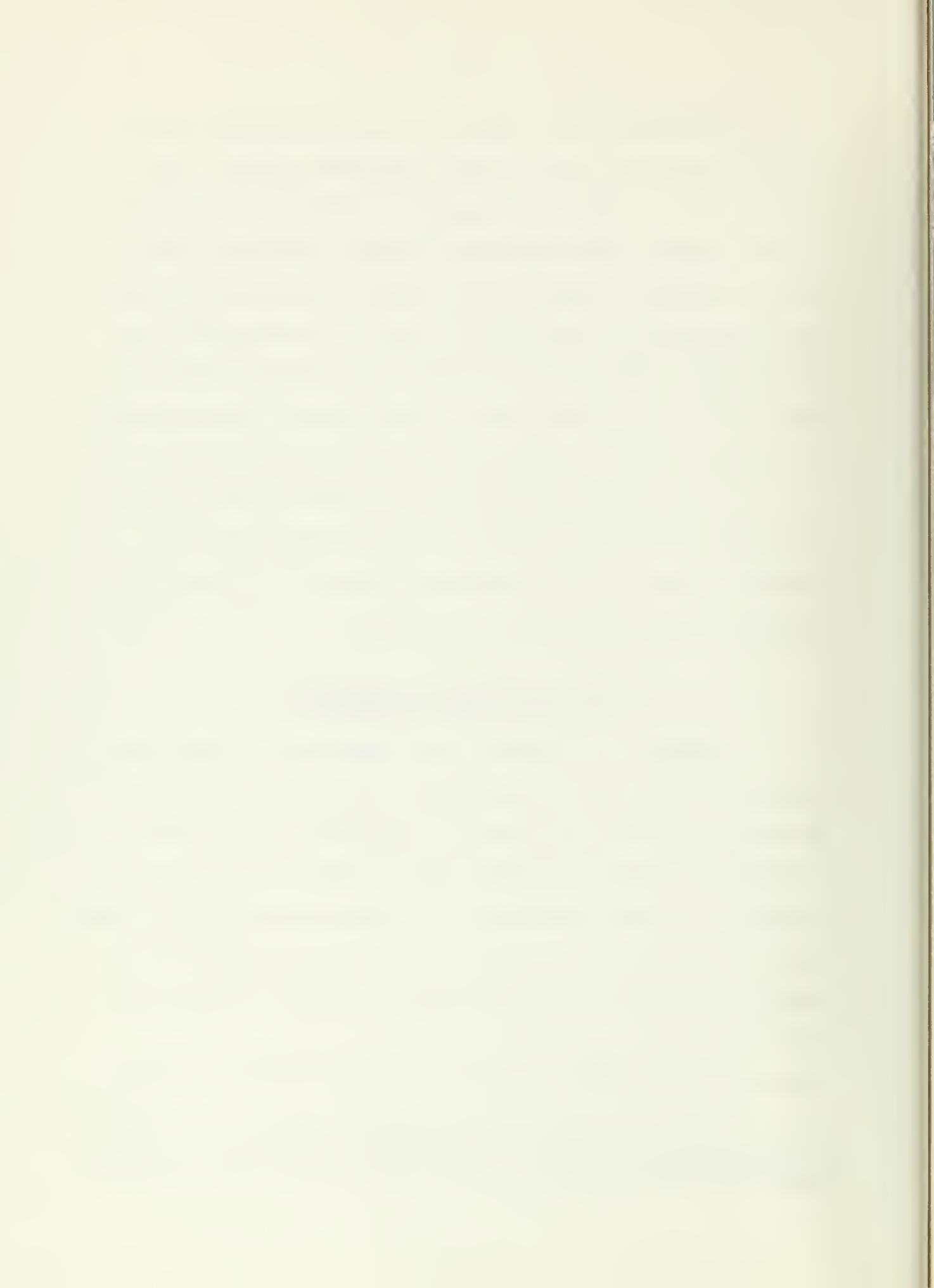
It is reasonable to believe, from the above statements, that Government intent in establishing the bid protest concept and the contractor intent in utilizing the concept are not necessarily in harmony.

Volume of Protests Submitted to Government Agencies

Because of the number and complexity of Government agencies which receive and process bid protests, the total volume of protests is unknown. The United States Senate attempted, in 1968, to gather data on the volume of bid protests processed entirely at the contracting officer level and discovered there was no information available.⁵ The General Accounting Office maintains a record of protests

⁴L. R. Brown, Attorney at Law, Washington, D.C., interview, May, 1969.

⁵U.S., Congress, Senate, Select Committee on Small Business, Selected Problems of Small Business in the Area of Federal Procurement, S. Rept. 1671, 90th Cong., 2d sess., 1968, p. 10.



filed with that agency as do certain Department of Defense agencies; however, there is no centralized collection point for all protest data. The volume of protests submitted to a limited number of Department of Defense agencies will be utilized as indicators of the total volume.

General Accounting Office

The General Accounting Office processed and rendered decisions on 339 bid protests during calendar year 1966. Of these, 316 were denied and 23 were sustained. During calendar year 1967, 391 bid protests were considered and of these, 361 were denied and 30 sustained. Calendar year 1968 resulted in an increase of bid protests to the level of 569, with 539 denied and 30 sustained.⁶ The first three months of calendar year 1969 resulted in 103 bid protest submissions to the General Accounting Office.

As evidenced by the figures above, bid protest submissions in calendar year 1967 increased 17 per cent over 1966, and submissions in calendar year 1968 increased 46 per cent over 1967. It is not possible to explain the large increase between years 1967 and 1968; however, it is feasible to believe that publication of General Accounting Office procedures, relative to bid protests, during this time period may have had some impact. It was during this period that the General Accounting Office first publicly

⁶Haycock, interview, May, 1969.

acknowledged the bid protest concept and published procedures to be utilized in submitting and processing bid protests.⁷ It is also feasible to believe an increase in Government expenditures during this period may have had some impact on the increase.

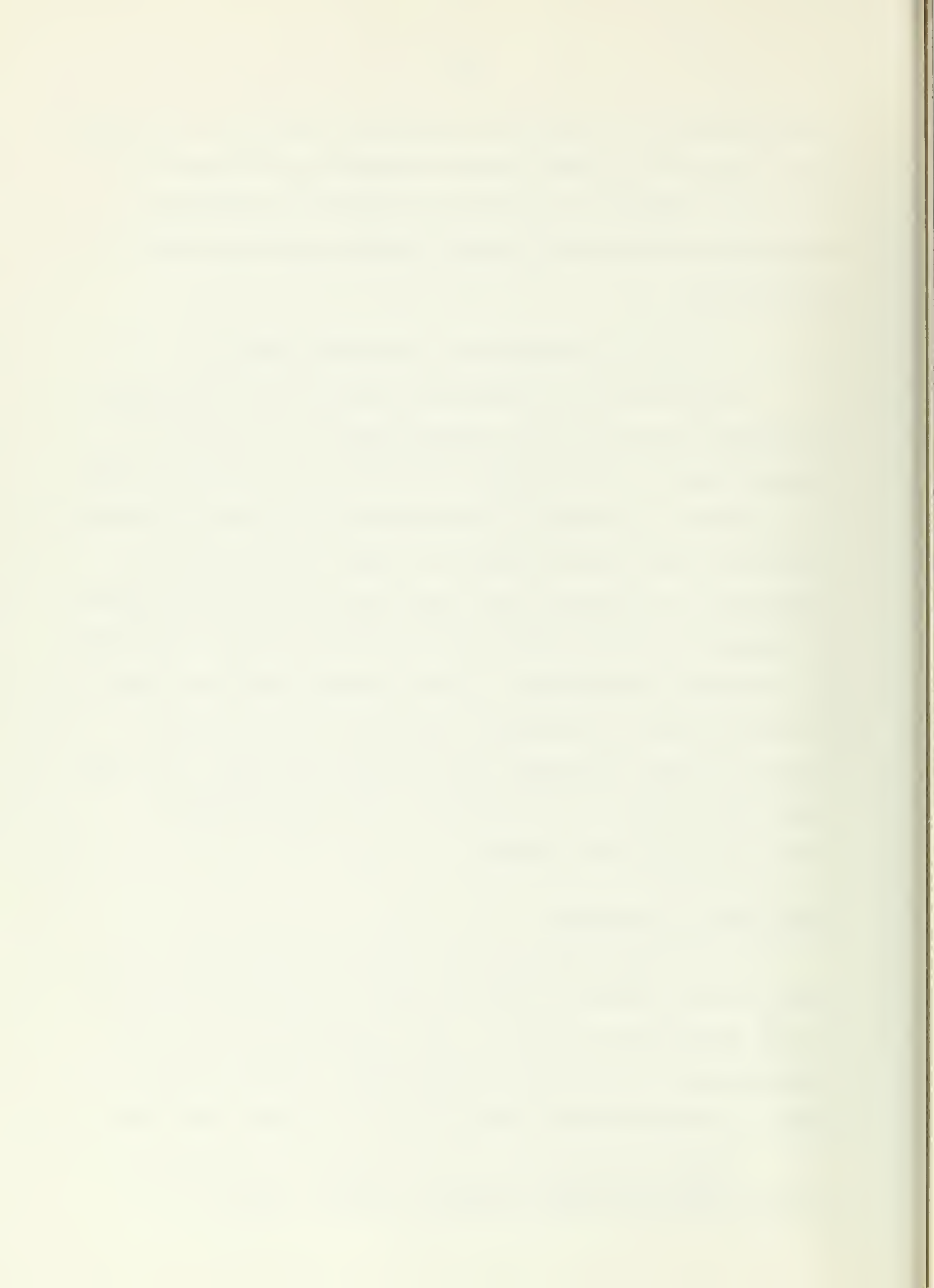
Selected Department of Defense Agencies

In an effort to obtain an indication of the volume of protests decided at the contracting officer level, a limited number of procurement activities have been surveyed. It is assumed the sample is representative of the population. Statistics shown below represent formal written protests submitted in accordance with specified procedures as opposed to informal protests submitted by telephone and not followed by a written confirmation. In each case it was noted that the small number of protests considered did not warrant detailed formal procedures and elaborate records. For this reason the figures are considered to be approximations rather than official figures.

Department of the Navy

Two United States Navy field purchasing activities were surveyed relative to the volume of protests submitted by the protestant directly to the contracting officer for determination. The United States Naval Aviation Supply Office in Philadelphia, Pennsylvania, estimates that four

⁷U.S., Comptroller General, "Title 4--Accounts," Federal Register, XXXII (August 4, 1967), 11313.



protests per month are received at that level.⁸ These protests result from a procurement program which involves approximately 105,000 procurement actions and \$591,000,000 annually. A survey at the United States Naval Shipyard, Philadelphia, Pennsylvania, indicated that, on the average, one or two bid protests were received each month by that activity.⁹ This volume of protests results from a procurement program which involves approximately \$41,000,000 and 58,000 procurement actions annually.

Department of the Army

A survey of the United States Army Mobility Equipment Command in St. Louis, Missouri, indicated sixteen protests had been received in the past ten months, for an average of 1.6 per month.¹⁰ The purchasing program at this activity results in approximately one-half the number of procurement actions found at the Philadelphia Naval Shipyard and approximately one-half the dollar volume found at the Aviation Supply Office.

Estimate of the population

It has been estimated above that three Department of Defense field activities average slightly more than two bid protest receipts per month. To estimate the total number

⁸T. Bartman, U.S. Naval Aviation Supply Office, Philadelphia, interview, March, 1969.

⁹B. Share, U.S. Naval Shipyard, Philadelphia, interview, March, 1969.

¹⁰G. Zelenak, U.S. Army Mobility Equipment Command, St. Louis, telephone interview, May, 1969.



of bid protests received per year by Department of Defense contracting officers it is only necessary to multiply the annual figure of twenty-four by the number of Department of Defense purchasing activities. Within the Department of the Navy there are eleven major systems commands, one of which is the Naval Supply Systems Command. There are sixty-four field purchasing activities under the Naval Supply Systems Command.¹¹ This could indicate that this small portion of the Department of Defense receives in excess of 1,536 bid protests annually. The total Department of Defense volume would be several times that stated above.

It has been stated by General Accounting Office personnel¹² and by Department of the Army personnel¹³ that a vast majority of all bid protests are filed with and resolved by the contracting officer. Data shown above tend to lend credibility to statements by both parties.

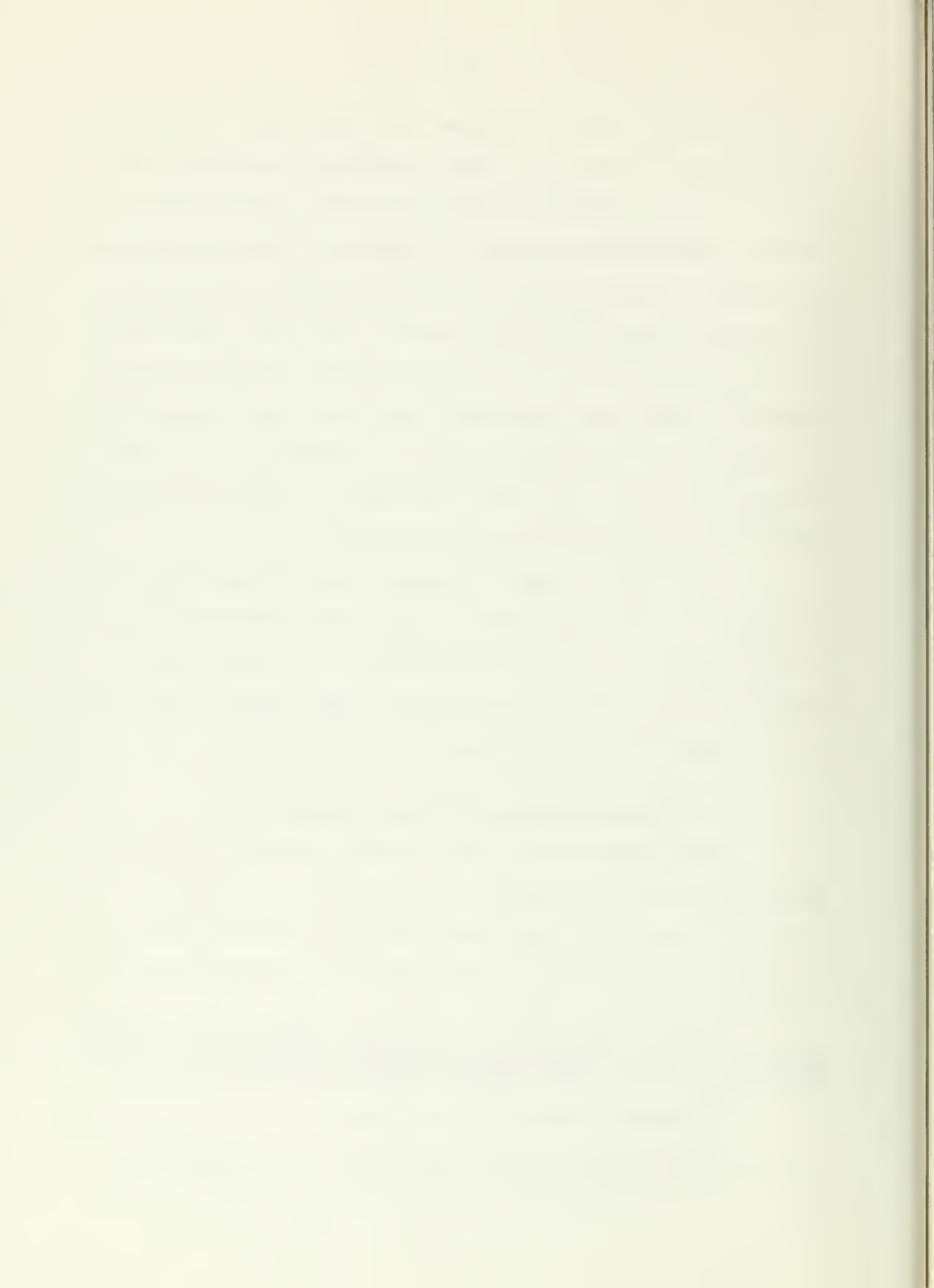
Classification of Protest Categories

Major categories of bid protests appear to be well agreed upon by knowledgeable authorities in the field. Mr. R. D. Witte has stated that most bid protests tend to be lodged in challenge to responsibility, responsiveness,

¹¹U.S., Department of the Navy, Headquarters, Naval Material Command, Survey of Procurement Statistics, NAVMAT Publication P-4200 (Washington, D.C., 1967), pp. 16-18.

¹²Haycock, interview, May, 1969.

¹³E. C. Cox, Army Policy Member, ASPR Committee, letter to the Chairman, DOD, ASPR Committee [1968].



and ambiguity.¹⁴ Department of the Navy personnel agree that these are the three major categories and add a minor category of protests involving a misunderstanding of procurement regulations by the protestant.¹⁵ Mr. Steve Haycock, of the General Accounting Office, concurs in the three major categories.¹⁶

Major Categories

Responsibility

Protests in the area of responsibility are directed toward the ability of a prospective contractor to meet standards set forth in the Armed Services Procurement Regulations (ASPR). These regulations state that a prospective contractor must:

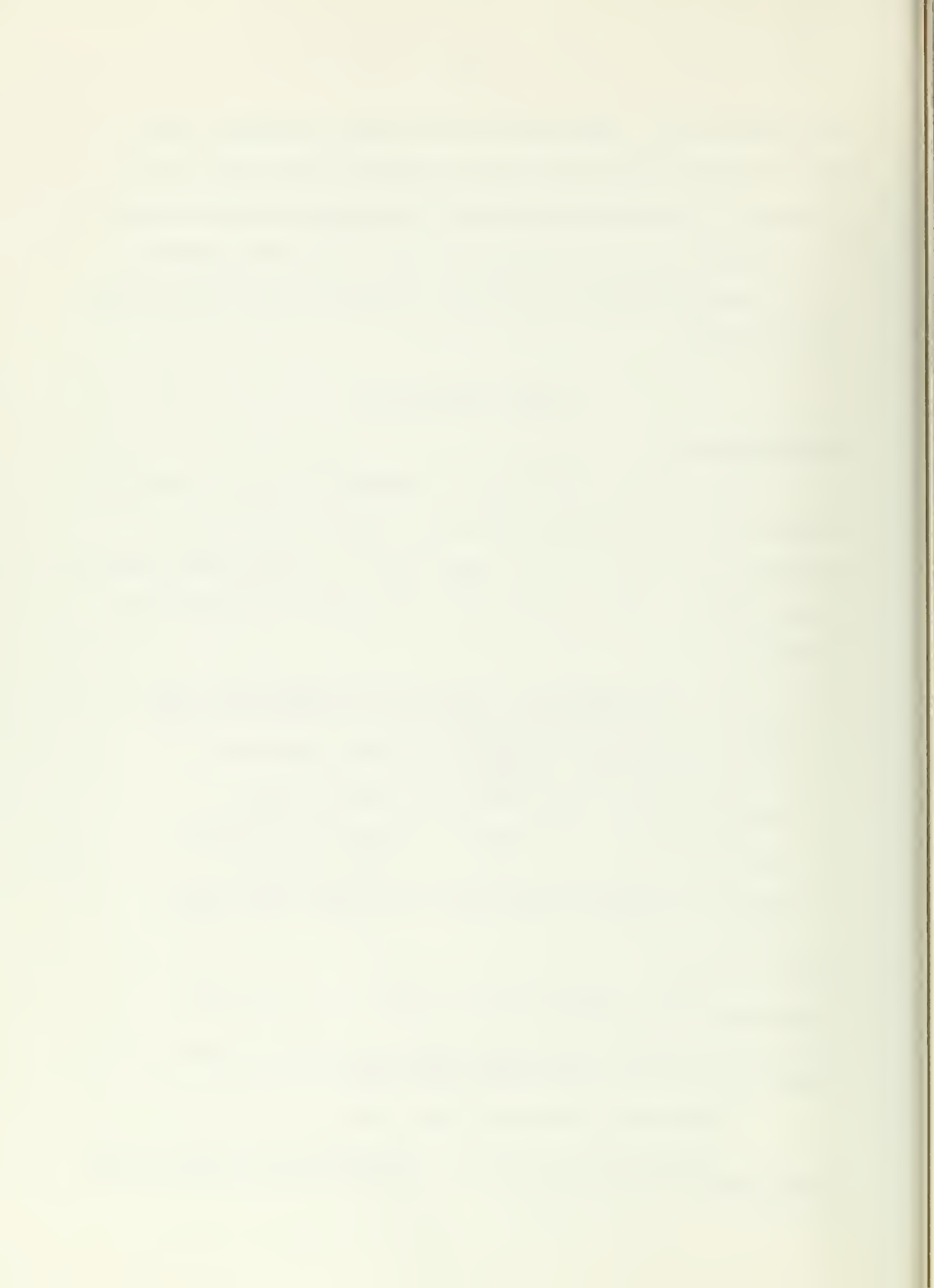
- (i) have adequate financial resources, or the ability to obtain such resources as required during performance of the contract . . .
- (ii) be able to comply with the required or proposed delivery schedule . . .
- (iii) have a satisfactory record of performance . . .
- (iv) have a satisfactory record of integrity; and
- (v) be otherwise qualified and eligible to receive an award under applicable laws and regulations. . . .¹⁷

¹⁴Witte, "Protesting the Award of Government Contracts," pp. 62-66.

¹⁵G. Wade, U.S. Naval Supply Systems Command, Washington, D.C., interview, May, 1969.

¹⁶Haycock, interview, May, 1969.

¹⁷Department of Defense, Armed Services Procurement Regulations, par. 1-903.1.



A protest in this area stems from the belief of an unsuccessful bidder that a successful bidder does not and cannot meet the stated requirements. A review of the standards cited above reveals that an actual determination of responsibility by a Government contracting officer is judgmental in nature. For example, the level of integrity which is satisfactory is a judgmental determination.

Because of the lack of specified standards against which to evaluate "responsibility protests," the General Accounting Office has stated that "responsibility of a contractor is primarily the function of the administrative agency, not questioned by GAO in the absence of bad faith or lack of a reasonable basis for determination."¹⁸ Thus, it would appear that the General Accounting Office will render protest decisions, relative to contractors' responsibility, in only limited situations.

The contracting officer, in rendering decisions on responsibility protests, may encounter two major problems. These result from pre-award surveys and Small Business Administration Certificates of Competency.

Pre-award surveys.--A protest in the category of responsibility may be a direct contradiction to the validity of a pre-award survey. "A pre-award survey is an evaluation by a contract administration office of a prospective contractor's capability to perform under the terms of a

¹⁸Comptroller General Decision B-165982 (1969).

proposed contract."¹⁹ When an unsuccessful bidder, in submission of a bid protest, declares a prospective contractor to be "nonresponsive" he is, in effect, declaring any existing pre-award survey to be invalid.

Certificate of competency.--The Small Business Administration (SBA) "has statutory authority to certify the competency of any small business concern as to capacity and credit."²⁰ In the event of a protest regarding the capacity or credit of a small business concern, for which a Certificate of Competency has been issued, the contracting officer is being requested to disregard the statutory authority of the SBA. The contracting officer is required to accept a Certificate of Competency as conclusive unless he has substantial doubt of the concern's ability to perform.²¹

Responsiveness

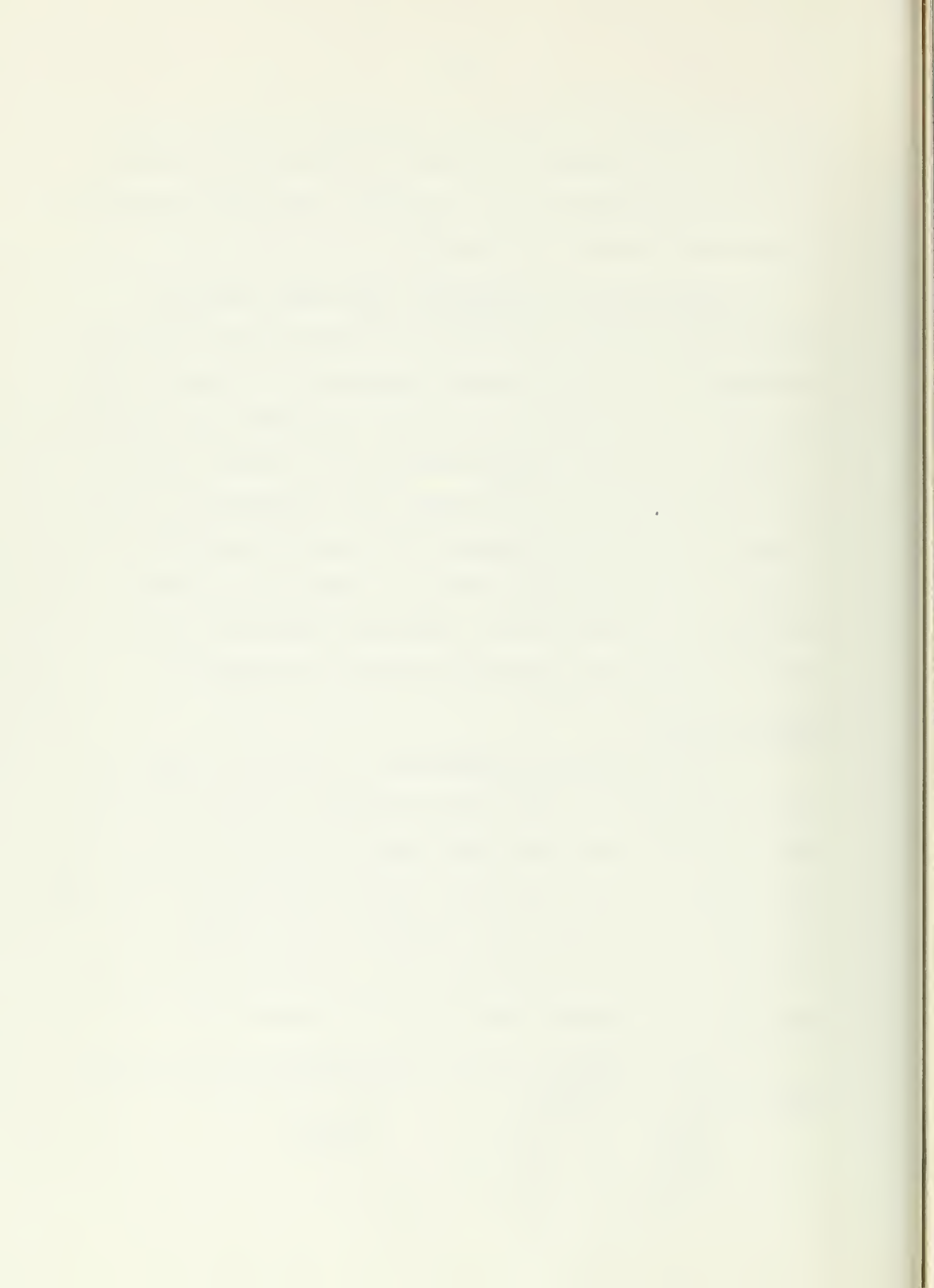
To be considered responsive, "a bid must comply in all material respects with the invitation for bids so that, both as to the method and timeliness of submission and as to the substance of any resulting contract, all bidders may stand on an equal footing and the integrity of the formal advertising system may be maintained."²² A protest in the category of responsiveness results when an unsuccessful bidder

¹⁹Department of Defense, Armed Services Procurement Regulations, par. 1-905.4.

²⁰Ibid., p. 1-705.4.

²¹Ibid.

²²Ibid., par. 2-301(a).



has submitted a bid which is not responsive to the invitation for bid.

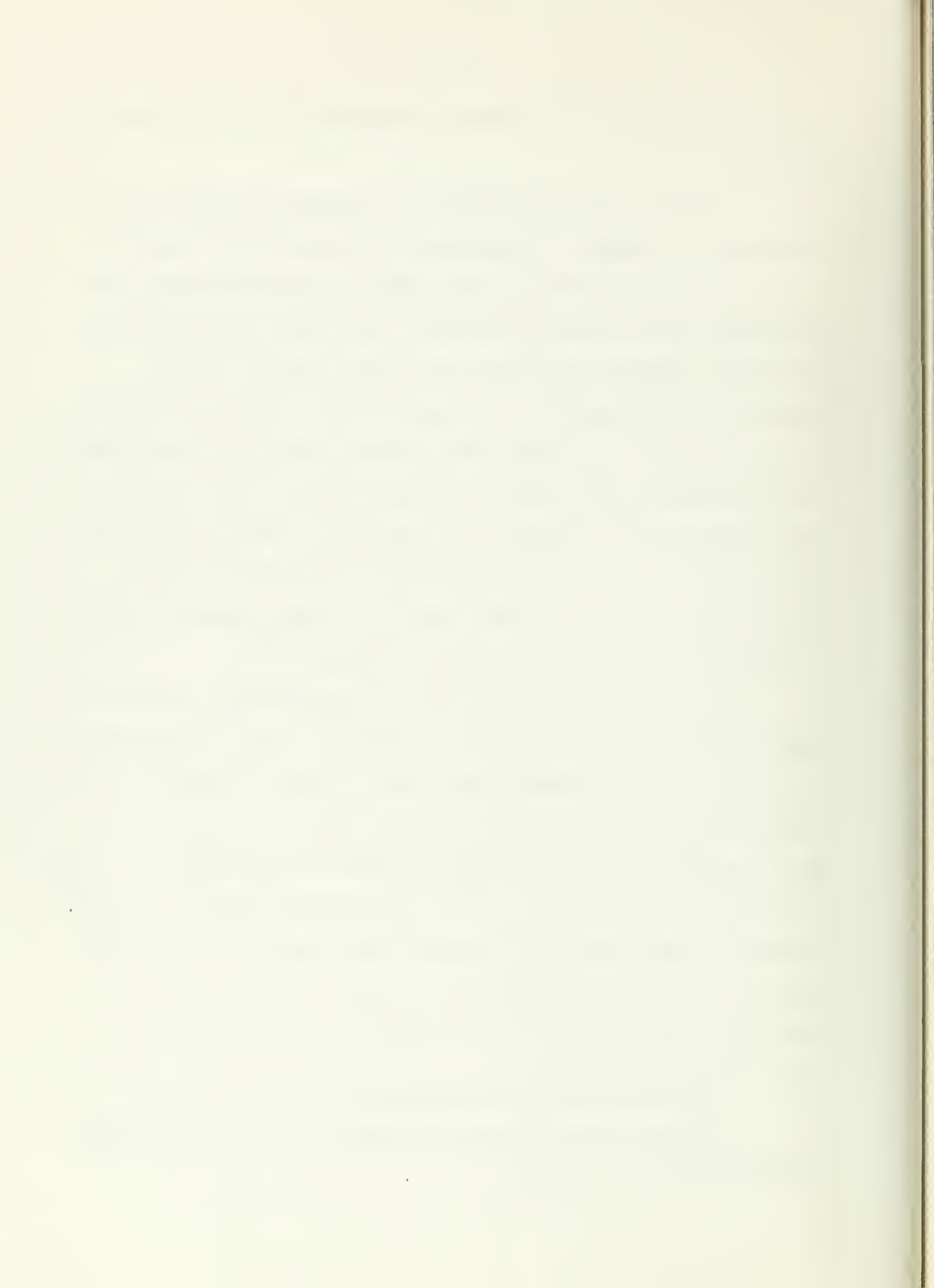
Unlike a determination of responsibility which may be judgmental in nature, a decision of responsiveness appears to involve a comparison of the award or proposed award with reasonably well-defined standards. This was indicated in a particular Comptroller General decision, which stated:

"Unlike a determination of responsibility, which is factual and as to which the contracting officer has wide discretion, the determination by the contracting officer that DEPCO's [the protestant's] bid was non responsive involves interpretation of the invitation and bid and the application of pertinent provisions of ASPR, and is a legal question which is subject to final review by this Office."²³

A dispute which may arise in determining responsiveness involves a determination of whether a bid irregularity is minor or major. ASPR states that "a minor informality or irregularity is one which is merely a matter of form or is some immaterial variation from the exact requirements of the invitation for bids. . . ."²⁴ Determination that an irregularity is minor does not automatically reject a bid as non-responsive. Herein lies another judgmental decision. A deviation which appears to be minor to the contracting

²³Comptroller General Decision B-161722 (1968).

²⁴Department of Defense, Armed Services Procurement Regulations, par. 2-405.



officer may appear major to an unsuccessful bidder and result in a bid protest.

A prime example of the question of a minor or major deviation is noted in a Comptroller General decision in which a successful bidder failed to comply with the invitation by disregarding the required statement relative to the F.O.B. point of origin. An unsuccessful bidder protested to the contracting officer, who in turn stated he had had several previous contracts with the successful bidder and consequently knew what F.O.B. point of origin was intended. As a result, the contracting officer ruled the deviation a minor one and proceeded with the award. The Comptroller General was not so lenient and subsequently sustained the protest by declaring the deviation a major alteration.²⁵

Ambiguity

Ambiguity protests, as contemplated by R. D. Witte, result from ambiguity in the invitations for bid or in the specifications themselves.²⁶ Any ambiguity in either of the above may result in a situation in which bidders prepare their bids on different bases. The realization by an unsuccessful bidder that the situation has occurred may result in a bid protest.

An example which clarifies the concept of ambiguity is a Comptroller General decision in which the protestant

²⁵Comptroller General Decision B-165792 (1969).

²⁶Witte, "Protesting the Award of Government Contracts," p. 66.



stated that, due to ambiguous language in the invitation relative to the quantity of items required, different bidders used different pricing strategies. The case was resolved by a determination that no other bidders had been misled.²⁷

Minor Category

Misunderstanding of regulations

This minor category has been suggested by G. Wade, of the United States Naval Supply Systems Command, who contends that many protests result from a misunderstanding of applicable regulations by the unsuccessful bidder.²⁸ A review of numerous protest cases revealed that many protests in the categories of responsibility, responsiveness, and ambiguity resulted indirectly from an inadequate understanding of procurement regulations by the protestant. A further review revealed there were actually protests resulting directly from an inadequate understanding of the regulations.

A case which clarified this category involved an unsuccessful bidder's protest stating that he was a small business concern and did not get the award because he was declared nonresponsible due to an unsatisfactory record of

²⁷Comptroller General Decision B-165714 (1969).

²⁸Wade, interview, May, 1969.

performance. The pre-award survey indicated a historical delinquency rate which was not due to capacity or credit and yet the protestant stated that he could not be ruled nonresponsible in view of an existing SBA Certificate of Competency.²⁹ Regulations state the Certificate of Competency is applicable only to capacity and credit.³⁰ The protestant did not understand the regulations pertaining to his protest.

Validity of Protests Submitted

A cursory review of General Accounting Office statistics would tend to indicate that the reasons for protest submission are, for the most part, invalid. In calendar year 1966, only twenty-three protests or approximately 7 per cent were sustained. In calendar year 1967, thirty protests or approximately 8 per cent were sustained. In calendar year 1968, protests sustained reached a new low of thirty or approximately 5 per cent.³¹

Further indicators of a lack of validity can be drawn from certain statements discussed previously. Haycock's statement that many contractors protest not necessarily to win the award, but to bring about a change in regulations, could indicate a lack of validity in bid

²⁹Comptroller General Decision B-165982 (1969).

³⁰Department of Defense, Armed Services Procurement Regulations, par. 1-705.4(a).

³¹Haycock, interview, May, 1969.

protests.³² From L. Brown came the statement that his clients protested with prior knowledge that the protest would probably be denied but with the intent of playing on the contracting officer's conscience to the extent he would give special consideration on the next procurement.³³ Another indicator of validity came from Quigley, who asserted that protestants, in many cases, desired to delay an award rather than prove the existence of a deviation from regulations.³⁴

There are no figures available to determine the validity of protests submitted to levels other than the General Accounting Office; however, the United States Senate has made an estimate of the situation. They have stated that "no reliable success figures for bid protests filed with the procurement agency head or headquarters are available, but on the basis of experience with congressional intervention in these cases, it is very doubtful that the quantity exceeds 10 per cent, and this only when the protest has been made prior to award."³⁵ This figure is in line with General Accounting Office data relative to validity and subsequent successes of protests.

³²Haycock, interview, May, 1969.

³³Brown, interview, May, 1969.

³⁴Quigley, interview, May, 1969.

³⁵Senate, Select Committee on Small Business, Selected Problems of Small Business, p. 11.

When confronted with the above statistics and attitudes it is difficult to believe the reasons for bid protest submissions have more than limited validity; however, there are certain other aspects which must be considered.

Included in the statistics pertaining to protests that were denied were protests in the category of responsibility. The Comptroller General has stated that "responsibility of a contractor is primarily the function of the administrative agency, not questioned by GAO in the absence of bad faith or lack of a reasonable basis for determination."³⁶ The applicable case was denied and resulted in another supporting statistic pertaining to the lack of validity; however, the case may not in fact represent an invalid protest. All that is actually demonstrated is that the Comptroller General did not render a decision relative to a responsibility determination by the contracting officer. The validity of the protest had not been challenged and yet the statistic, as reported, represents an invalid or unsuccessful protest.

In another case reported as a denied protest, the Comptroller General agreed with the protestant that his offer had not been evaluated in accordance with sound procurement practices, but further stated that the General Accounting Office was "not disposed to question the award

³⁶Comptroller General Decision B-165982 (1969).

. . . in view of the urgency of the requirement."³⁷ The Comptroller General, basically, acknowledged the protest validity but denied the protest.

Further, General Accounting Office personnel readily admit that many protest cases which have been denied could just as easily have been sustained, but that the cost to the Government in terms of dollars has a strong influence on the determination.³⁸ In other words, the statistics for denied protests include valid protests which would have been costly to the Government if they had been sustained. It has been stated that where the cost to the Government is large, the General Accounting Office interprets applicable procurement regulations very loosely in rendering protest decisions.³⁹

In essence, even though available statistics indicate a lack of validity in protest submissions, there is evidence of certain mitigating situations which decrease the validity of the statistics and increase the validity of bid protests. It is feasible to believe, based on available evidence, that many protests are in fact submitted for invalid reasons but that fewer invalid protests are submitted than the statistics indicate.

³⁷Comptroller General Decision B-162465 (1968).

³⁸Haycock, interview, May, 1969.

³⁹Quigley, interview, May, 1969.

CHAPTER III

ANALYSIS OF PROTEST PROCEDURES

Review of Basic Parameters

Basic instructions, relative to determination of bid protests, have been published by the Comptroller General and by the Department of Defense and appear in the Federal Register¹ and the Armed Services Procurement Regulations² respectively. These instructions provide the basic parameters by which bid protests are determined.

Comptroller General

Comptroller General rules and regulations, as published, make no distinction between pre-award and post-award protests. Further, the rules and regulations make no distinction between negotiated and advertised awards. At the Comptroller General level of authority one set of published rules is used for all types of bid protests.

The rules provide that an interested party wishing to protest a proposed award or an award already made may do so by notifying the Comptroller General by telegram or

¹Comptroller General, "Title 4--Accounts" (1968), p. 12288.

²Department of Defense, Armed Services Procurement Regulations, pars. 2-407.9, 3-509.

letter. The notification must include information identifying the procurement, the agency concerned, and the specific grounds upon which the protest is based. The protestant is further requested to provide a copy of the protest to the contracting officer of the involved agency.³

The rules provide an opportunity for involved parties that might be adversely affected by the protest to present views prior to rendering of a final decision, unless time does not permit.⁴ The rules further provide that, consistent with other regulations, the General Accounting Office will provide full protest data to the involved parties.⁵

The published rules of the Comptroller General provide valuable information to the parties involved in a bid protest; however, as published, they do not discuss internal procedures utilized in the process. This aspect will be discussed in a later section. It should be noted that the published regulations contain no mention of time frames for protest determination.

Comptroller General rules and regulations pertinent to bid protests are not implemented by other instructions as are Department of Defense procedures contained in the Armed Services Procurement Regulations. Comptroller General

³Comptroller General, "Title 4--Accounts" (1968), p. 12288.

⁴Ibid.

⁵Ibid.

rules and regulations in this area are based on the authority granted in the Budget and Accounting Act of 1921.⁶

Department of Defense

Department of Defense rules and regulations relative to bid protests are published in the Armed Services Procurement Regulations (ASPR)⁷ issued under the authority of the Armed Services Procurement Act of 1947.⁸ It is interesting to note that in the Act, no apparent or specific authority is granted relative to determination of bid protests.

Regulations provide that contracting officers shall consider all pre-award and post-award protests and that if the protest is oral and cannot be otherwise resolved, written confirmation of the protest shall be requested.⁹

Determination of the bid protest decision necessitates consideration of the Comptroller General's views only when it is considered desirable.¹⁰

ASPR provides that, in cases of pre-award protests, the contracting officer shall give notice of the protest to bidders affected by the protest and shall request the bidders to extend the time for acceptance of their bids.

⁶Budget and Accounting Act, 42 Stat. 24 (1921).

⁷Department of Defense, Armed Services Procurement Regulations, pars. 2-407.9, 3-509.

⁸Armed Services Procurement Act, 10 U.S.C. 137 (1947).

⁹Department of Defense, Armed Services Procurement Regulations, par. 2-407.9(a).

¹⁰Ibid., par. 2-407.9(b)(2).

If the bidders do not consent to an extension of bid times, the contracting officer is to consider proceeding with the award.¹¹

ASPR permits the contracting officer to proceed with the contract award, under certain conditions, even when confronted with a pre-award protest. The conditions necessary for proceeding with the award must be determined by the contracting officer and include:

- (i) The items to be procured are urgently required; or
- (ii) Delivery or performance will be unduly delayed by failure to make award promptly; or
- (iii) A prompt award will otherwise be advantageous to the Government.¹²

The actions must be documented and all parties notified of the decision to proceed with award.

Determination to proceed with award, when a protest has been lodged directly with the Comptroller General, must be approved at a level of authority higher than the contracting officer. The intent to proceed with award will be transmitted to the Comptroller General, and his views relative to the protest obtained, prior to award.¹³

Regulations pertinent to post-award protests are not contained in the Armed Services Procurement Regulations. The regulations simply state that "a protest received after

¹¹Ibid., par. 2-407.9(b)(1).

¹²Ibid., par. 2-407.9(b)(3).

¹³Ibid., par. 2-407.9(b)(2).



award shall be handled in accordance with Departmental procedures."¹⁴

Procedures discussed above pertain to protests of procurements by formal advertising. Relative to protests of procurements by negotiation, the regulations state that "protests against awards of negotiated procurements shall be treated substantially in accordance with 2-407.9 [relating to protests against formally advertised procurements]."¹⁵

In essence, the basic parameters established by the ASPR are void of procedures relative to post-award protests. Further, the regulations make no valid distinction between advertised and negotiated procurement protests. One obvious deficiency in the ASPR relates to time frames. There is no mention of any mandatory time frames for processing bid protests.

It is interesting to note that although the Comptroller General appears to have statutory authority behind his regulations the Department of Defense has no direct statutory authority to determine bid protests. Even without apparent statutory authority the Department of Defense authorizes contracting officers to render protest decisions with the advice of the Comptroller General considered only when deemed desirable. This would appear to provide a conflict of authority in determination of bid

¹⁴Ibid., par. 2-407.9(c).

¹⁵Ibid., par. 3-509.

protests. The conflict is even more apparent in the area in which the Department of Defense allows contract award, prior to protest determination by the Comptroller General, without approval of the Comptroller General. This appears to contradict the authority of the Comptroller General.

Review of Implementing Procedures

The basic regulations, provided in ASPR, are implemented by various instructions published by the Defense Supply Agency and by the Departments of the Army, Navy, and Air Force. Implementing instructions published by these agencies range from complex and all-inclusive to very simple.

Department of the Army

Department of the Army procedures are published in the Army Procurement Procedure (APP).¹⁶ Procedures relative to bid protests are contained in the section which discusses formal advertising, with no mention of protests against negotiated awards.

The procedures provide that the contracting officer shall attempt to resolve a protest unless he considers it desirable to submit the protest to a higher authority, or he considers it desirable to obtain the opinion of the Comptroller General before award or the protestant indicates

¹⁶U.S., Department of the Army, Army Procurement Procedure (Washington, D.C., 1969), par. 2-407.9.



that he intends to carry the protest to a higher authority.¹⁷ It is rather obvious that the procedures reduce the authority of the contracting officer in settling protests. Whereas ASPR states that the contracting officer shall consider all bid protests, the APP qualifies the type of protests to be considered by the contracting officer.

The procedures are very explicit in the area relative to protests submitted to higher authorities. In those cases the APP requires a report from the contracting officer which includes: (1) a signed statement from the protestant setting forth facts and the basis of the protest; (2) a signed statement from other involved parties affected by the protest, indicating their position; (3) a copy of the protestant's bid and a copy of the bid being considered for award; (4) a copy of the solicitation; (5) a copy of the abstract of bids; (6) copies of any other relevant documents; and (7) a signed statement by the contracting officer relevant to his findings, action taken to resolve the protest and the results, and the contracting officer's recommendations.¹⁸

APP further identifies the chain of command involved in submissions to authorities higher than the Head of Procuring Activity (HPA). Protests emanating from purchasing offices under cognizance of Headquarters, Army Material Command are to be submitted to the Office of the General

¹⁷Ibid., par. 2-407.9(a).

¹⁸Ibid., par. 2-407.9(b).



Counsel, Headquarters, Army Material Command.¹⁹ Protests emanating from purchasing offices under cognizance of the Chief of Engineers are to be forwarded to the Chief of Engineers, who will forward them to the Comptroller General.²⁰ Each authority in the chain of command will add recommendations to those of the contracting officer.

Relative to proceeding with a protested award, the contracting officer may make the award pursuant to ASPR 2-407.9(b)(3); however, he must forward copies of his decision to the HPA and to any higher authority to which the protestant has indicated he may protest.²¹ This procedure differs in cases where the contracting officer forwards the pre-award protest to higher authorities for disposition. In such cases, the contracting officer must have authority from the higher authorities prior to award.²²

The area of post-award protests is equally as vague as the ASPR. APP states that the HPA is to be notified immediately upon receipt of a post-award protest. If it appears that the award may be invalid, and there will be subsequent delay of material under the contract, the contracting officer, subject to authority from the HPA, is directed to attempt to reach a mutual stop work agreement

¹⁹Ibid., par. 2-407.9(c).

²⁰Ibid., par. 2-407.9(d).

²¹Ibid., par. 2-407.9(g).

²²Ibid., par. 2-407.9(h).

with the contractor unless the action is prejudicial to the Government. If the contractor does not consent to a stop work order the HPA may direct issuance of the order. In no case is the contracting officer allowed to take action without advice from the appropriate level of higher authority.²³

Defense Supply Agency

Defense Supply Agency regulations are published in the Defense Supply Procurement Regulations (DSPR).²⁴ The regulations make no reference to protests of negotiated awards and, additionally, are limited to those procedures necessary to process protests submitted to authorities higher than the contracting officer.

Pre-award procedures relative to protests submitted to higher authority or the Comptroller General provide that no award will be made until the protest is resolved or the utilization of the requirements of ASPR 2-407.9(b)(3) are approved by the Counsel, Defense Supply Agency.²⁵ Content of the report and file forwarded by the contracting officer to the Counsel is the same as that required by the APP.

Post-award protest procedures are equally as vague as those published in the APP. The procedures are similar

²³Ibid., par. 2-407.9(j).

²⁴U.S., Defense Supply Agency, Defense Supply Procurement Regulations (Washington, D.C., 1966), par. 2-407.9.

²⁵Ibid., par. 2-407.9(b).

to Army procedures in requiring an attempt to reach a mutual stop work agreement with the contractor and a possible issuance of a stop work order in the event such agreement cannot be reached. The necessary guidance from higher authority is provided by the Counsel, Defense Supply Agency.²⁶

In summary, the Defense Supply Agency makes no provision for protests submitted to the contracting officer and further provides for the higher level of authority to be the Counsel. The instructions for post-award protests are vague at best.

Department of the Navy

Department of the Navy procedures are published in the Navy Procurement Directives (NPD).²⁷ No separate provisions are made for negotiated procurement protests. The directives provide that prior to proceeding with an award protested to the Comptroller General, the contracting officer must receive authority from a higher level within the purchasing activity. Notice of intent to make award must be routed through the Command, Bureau, or Headquarters which advised the contracting officer of the protest. Further, award is to be withheld until advice of the Comptroller General, concerning the status of the protest, is

²⁶Ibid., par. 2-407.9(c).

²⁷U.S., Department of the Navy, Navy Procurement Directives, NAVEXOS P-4201 (Washington, D.C., 1966), par. 2-407.9.

received.²⁸ The directives provide no guidance for pre-award protests submitted directly to the contracting officer.

Navy directives provide that post-award protests shall be handled in accordance with ASPR 2-407.9(a) when they are addressed only to the purchasing activity; however, the views of the Systems Command, Bureau, or Headquarters should be obtained in the matter. Post-award protests submitted to the Comptroller General require a report from the procuring activity and the regulations simply require that the report contain all information necessary to reply to the protest. The report is forwarded via the Systems Command, Bureau, or Headquarters which forwarded notice of the protest to the procuring activity.²⁹ It should be noted that the regulations are less comprehensive and less stringent than those of the other services.

Department of the Air Force

Department of the Air Force procedures are published in the Air Force Procurement Instructions (AFPI).³⁰ The procedures provide a responsibility for the contracting officer to decide, with concurrence of the local staff judge advocate, whether there is any basis for a pre-award protest

²⁸Ibid., par. 2-407.9(b).

²⁹Ibid., par. 2-407.9(c).

³⁰U.S., Department of the Air Force, Air Force Procurement Instructions (Washington, D.C., 1968), par. 2-407.9.

and to take the action necessary to rectify the situation if such a basis exists.³¹

A minor contradiction appears to exist in the procedures. The contracting officer is required to submit denied protests, or protests in which the contracting officer desires views of higher authority, to the Air Force Logistics Command (AFLC) or the Air Force Systems Command (AFSC) as appropriate. The report is to be comprised of basically the same information as that requested by the APP and DSPR. The contradiction appears to occur where authority is granted for the contracting officer to dispense with submission of denied protests, to AFLC and AFSC, if he is satisfied that the protest is without a reasonable degree of foundation.³²

The procedures provide that prior to proceeding with award under the provisions of ASPR 2-407.9(b)(3), when the award has been protested to the Comptroller General, the contracting officer must have approval from Headquarters, United States Air Force.³³

Provisions for post-award protests are virtually nonexistent. The procedures state that all post-award protests will be processed at AFLC or AFSC and that the

³¹Ibid., par. 2-407.9(b)(A).

³²Ibid.

³³Ibid., par. 2-407.9(b)(C).

contracting officer's report will contain the same information as required in pre-award protests.³⁴

Pre-award and post-award protests may be considered by the Director of Procurement and Production (MCP) or the Assistant to the Director, Headquarters AFLC, or by the Deputy Chief of Staff/Procurement and Production or Assistant Deputy Chief of Staff/Procurement and Production, Headquarters, AFSC, in the event the protests are lodged at a level no higher than the major command or subordinate field organization level.³⁵

The procedures further provide that pre-award and post-award protests filed at Headquarters USAF or higher will be forwarded through AFLC or AFSC.³⁶

As with regulations and procedures of the other services, the AFPI procedures relative to bid protests are included under the section relative to formally advertised procurement with no mention of negotiated procurement protests.

Comparison of Actual Procedures
with Basic Parameters and
Implementing Procedures

Published Comptroller General rules and regulations give a rather broad coverage of protest procedures. The actual mechanics of rendering a protest decision at the

³⁴Ibid., par. 2-407.9(c).

³⁵Ibid., par. 2-407.9(d).

³⁶Ibid., par. 2-407.9(e).

Comptroller General level involve assignment of the protest to a General Accounting Office attorney for action. The attorney subsequently notifies, by telephone, designated personnel at the involved procuring agency and requests a report relative to the protested award. Based on the report the protest decision is rendered. It was noted that protests were not necessarily determined in the order in which they were received, but were, on occasion, determined in order of importance.³⁷

A survey of certain Department of Defense agencies revealed that actual procedures utilized in determination of bid protests were primarily in accordance with the basic parameters and implementing instructions. The ASPR, however, refers to the contracting officer as the rendering body while the implementing instructions make reference to legal counsel vice the contracting officer. In most cases the actual protest determinations or recommendations are prepared by the legal counsel with assistance from the procurement personnel.

The Naval Ship Systems Command procedures provide for the Office of Counsel to receive protests and to obtain assistance from technical and contracting personnel in rendering the decision. In that Command, "bid protests are handled directly by one organizational entity--Office of Counsel, SHIPS OOH."³⁸

³⁷Haycock, interview, May, 1969.

³⁸Commander, Naval Ship Systems Command, letter to Chief of Naval Material, April 25, 1969.

The internal procedures followed by the Naval Supply Systems Command involve comparison of the protest with the proposed award or existing award and a comparison against the ASPR relative to procurement procedures. Following this review and comparison by contracting personnel, the protest is submitted to legal counsel for review, to determine legality. Based on these reviews, a letter relative to the protest is prepared.³⁹

With the exception of the Comptroller General rules, which do not set forth actual working procedures, agencies rendering protest decisions appear to follow the procedures prescribed in the basic and implementing instructions. The working procedures at the agency level, in those agencies reviewed, indicated the process to be one of interaction between legal personnel and contracting personnel.

³⁹Wade, interview, May, 1969.

CHAPTER IV

ANALYSIS OF PROTEST DECISIONS

Basic Considerations in Determination

A complete protest decision is twofold in nature. It includes a determination relative to denying or sustaining the objection submitted by the protestant and it also includes, providing the protested contract has been awarded, a determination of disposition of the existing contract. As will be discussed later, the two aspects of a decision are not always in complete harmony.

The first consideration in rendering a protest decision is the legality of the award or proposed award. It is not the intent of this study to define legality in its entirety; rather, legality will be discussed in terms of actions of, based upon, or authorized by law. The intended meaning of the word "law" relates to applicable statutes and regulations.

The second consideration in rendering a protest decision involves the concept of best interest of the Government and it has been indicated that this aspect may be the primary factor in rendering protest decisions.¹

¹Haycock, interview, May, 1969.

It is doubtful whether a contracting officer, when deciding a protest, will openly admit a mistake in designating the original awardee. Further, the General Accounting Office, in rendering a decision, is charged by statute with protecting the interests of the Government. Therefore, because these are the two major decision rendering bodies, a protest decision may be more heavily influenced by the concept of best interest than by the concept of legality.

Legality

The legality of an award or a proposed award is considered in terms relative to governing statutes and regulations. Determinations of legality appear more feasible in protests against advertised awards than against negotiated awards due to the fact that advertised procurements may be evaluated against objective standards while negotiated procurements result from numerous subjective decisions and to a degree defy objective evaluation.² The objective standards are those set forth in the Armed Services Procurement Act.³

Evaluation of negotiated procurement protests becomes rather "gray," and as a result judgmental in nature, because of the lack of objective standards against which

²Witte, "Protesting the Award of Government Contracts," p. 59.

³Armed Services Procurement Act, 10 U.S.C. secs. 2304, 2305 (1947).

to evaluate them.⁴ A term which appeared in a large number of negotiated procurement protest decisions reviewed related to the contracting officer's unsound exercise of discretion with no violation of law or regulation. This results directly from the lack of a set of standards against which to compare negotiated procurement protests.

Determinations of legality are sometimes complicated by technical questions in the protest. Since the General Accounting Office has no scientists or technical personnel on its staff it is sometimes necessary to rely on the procuring agency's recommendation when determining the legality of an award or proposed award.

Interest of the Government

As mentioned previously, a protest decision is the result of an ex parte process in which the Government renders a decision on a Government action. "This means that, when the interests of the Government and those of the protester clash, the Comptroller General must decide the case in terms of the best interests of the Government."⁵ As a result, the concepts of legality and best interest are sometimes in conflict, as noted in cases in which a protest is sustained but the existing contract is not disturbed. It has been stated that when a large amount of money is

⁴Wade, interview, May, 1969.

⁵Senate, Select Committee on Small Business, Selected Problems of Small Business, p. 12.

involved, the General Accounting Office tends to interpret the laws and regulations very loosely.⁶ This statement has been substantiated by General Accounting Office personnel, who have stated that both money and time have a large influence on final decisions.⁷ In the final analysis, a protest decision may result in a conflict of principle versus time and money in which the Government is more interested in time and money than in principle.

Money

As a guardian of Government funds the Comptroller General is bound to protect those funds and ensure that they are wisely spent. Steve Haycock, of the General Accounting Office, has stated that costs are considered very closely before rendering a protest decision which could result in an unnecessary expense to the Government.⁸ This principle explains the Comptroller General's decision in many bid protest cases in which it was conceded that the protester was correct in the contention that the contract had been improperly awarded to someone else, but that no remedy could be given the protester because to cancel the contract would be either impractical or prohibitively expensive.⁹

⁶Quigley, interview, May, 1969.

⁷Haycock, interview, May, 1969.

⁸Ibid.

⁹Senate, Select Committee on Small Business, Selected Problems of Small Business, p. 12.

Time

The element of time, or how fast the Government needs the material under the protested contract, is always ascertained prior to rendering a protest decision.¹⁰ If the material is urgently required, it is feasible the award will not be disturbed. In one apparently common decision the Comptroller General agreed that the protestant's bid had not been evaluated in accordance with sound procurement practices, but further stated that he was not disposed to question the award in view of the urgency of the requirement.¹¹ Time was considered more heavily than principle in the case.

Time Necessary to Render
Protest Decisions

It has been stated that, to be effective, "decisions in bid protest cases must be timely and cannot be subjected to time-consuming procedures that are not essential to disposition of the protest."¹² A review of bid protest decisions reveals that they are not necessarily timely.

As mentioned previously, a protest submitted to the Comptroller General requires that the office request a report relative to the award from the procuring agency. The procuring agency prepares the report and forwards it

¹⁰Haycock, interview, May, 1969.

¹¹Comptroller General Decision B-162465 (1968).

¹²U.S., Congress, House, Committee on Government Operations, GAO Bid Protest Procedures, H. Rept. 1134, 90th Cong., 2d sess., 1968, p. 3.

through the chain of command to the Comptroller General, who renders the final decision.

The Department of the Army has summarized the time required for preparation and submission of a protest report to the General Accounting Office. It states that four to seven days elapse from the time the General Accounting Office requests a report until the Head of the Procuring Activity receives the request. Approximately thirty additional days are required for preparation of the contracting officer's report and an additional seven to ten days for final review through the chain of command prior to dispatch to the General Accounting Office. The summary estimates that on the average it takes the Army forty-two days to process the report.¹³

The Defense Supply Agency's estimate for a similar process is thirty days.¹⁴ The Department of the Air Force claims an average of forty days.¹⁵ An average of the time periods required by six major Naval Commands indicates that it takes twenty-eight days to process the report. A review of Navy figures showed times ranging from fifteen to seventy-three days for preparation of the report.¹⁶

¹³Cox, letter to the Chairman, DOD, ASPR Committee.

¹⁴R. P. Cole, Defense Supply Agency, Washington, D.C., interview, May, 1969.

¹⁵Senate, Select Committee on Small Business, Selected Problems of Small Business, p. 12.

¹⁶J. D. Blanchard, Office of the Chief of Naval Material, Washington, D.C., interview, May, 1969.

The General Accounting Office has recently established a new procedure whereby, upon receipt of the protest at that office, the assigned counsel notifies the involved procurement agency of a pending protest by phone. It seems feasible that this could reduce the process by four to seven days since this is the average time that has been allotted for the procuring agency to receive the written protest. Interviews with numerous procurement personnel revealed a degree of appreciation for receiving advance warning of a protest; however, the procurement personnel also revealed a degree of hesitancy about starting all necessary action until receipt of the written protest.

After receipt of the report by the General Accounting Office it is presently estimated that an additional forty-two days are required to render the final decision.¹⁷ This would tend to indicate that at a minimum a protest submitted to the General Accounting Office would take, on the average, seventy days, and at a maximum could take eighty-four days, to receive a final decision. The time factor involved in rendering a protest decision is the biggest problem area at the present time.¹⁸

Protests submitted directly to the contracting officer appear to be less time consuming than those submitted

¹⁷Haycock, interview, May, 1969.

¹⁸Ibid.

to the General Accounting Office. The time factor is reduced by eliminating the delay of seven to ten days required to transmit the report through the chain of command and by eliminating the delay of four to seven days required to transmit the request for a report to the procuring agency. The biggest time factor eliminated is, of course, the forty-two days required by the General Accounting Office to review the case and render a final decision. In light of this shorter time period, protest decisions rendered by contracting officers may be more equitable to all concerned parties than those submitted to the General Accounting Office. This concept is discussed later in this chapter and is expanded further in Chapter V.

Consistency of Decisions

Consistency of protest decisions may be evaluated in terms of decisions rendered by contracting officers and subsequently protested to the Comptroller General for a final decision or in terms of decisions on different protests, of a similar nature, rendered by the same agency.

Consistency of Decisions Rendered by the Comptroller General and by the Contracting Officer

There is evidence to indicate that, although a majority of decisions rendered by contracting officers are supported by the Comptroller General, some decisions are not sustained. The Commander, Naval Electronics Systems

Command has reported that of nineteen bid protests resolved by the General Accounting Office during fiscal year 1968 and the first three quarters of fiscal year 1969, the Command's judgment was sustained in sixteen cases.¹⁹ The Commander, Naval Supply Systems Command has reported that during the same time period the General Accounting Office resolved 146 protests involving the Command and sustained the Command's judgment in 141 of these cases.²⁰ These figures promote the idea that the contracting officer and the General Accounting Office normally agree on protest decisions and would render consistent decisions most of the time.

There are, as mentioned, cases in which the contracting officer and the Comptroller General disagree in their decisions. In one such instance the contracting officer ruled on a protest against the responsiveness of the awardee's bid. The contracting officer determined the deviation in the awardee's bid was a minor deviation, as provided in ASPR 2-405, and denied the protest. The Comptroller General subsequently received the protest from the protestant and sustained it, maintaining that the deviation was major and was not provided for by ASPR 2-405.²¹ A

¹⁹Commander, Naval Electronics Systems Command, letter to the Chief of Naval Material, April 22, 1969.

²⁰Commander, Naval Supply Systems Command, letter to the Chief of Naval Material, April 23, 1969.

²¹Comptroller General Decision B-165792 (1969).

review of the figures above reveals that these cases seldom occur, possibly because both agencies are protecting the Government's interests.

Consistency of Decisions
by the Same Agency

As mentioned previously, protests of negotiated procurements involve a review of many judgmental decisions made in awarding the contract. This is opposed to a protest of an advertised procurement in which objective standards are available against which to compare the award procedures. It is feasible that inconsistencies in legality determinations are possible when rendering protest decisions resulting from judgmental or subjective bases. It has been stated that many protest decisions, when received, can be argued in favor of either party--the Government or the protestant.²² This could promote a belief that inconsistencies may occur in protest decisions.

One obvious thread of inconsistency is evident in the decisions rendered by the same activity and this relates to disposition of existing contracts. The disposition of an existing contract appears to depend a great deal on the best interest of the Government at the time. To illustrate this idea: Two Comptroller General decisions are available. Both protests were sustained but disposition of the existing contracts was different and inconsistent.

²²Haycock, interview, May, 1969.

In one case the contract was in an advanced state of completion and the decision subsequently stated:

". . . practical considerations preclude our disturbing the award. . . ." ²³ In the second case a stop work order had been issued ten days after award and this resulted in no termination costs to the Government. In this case the contract was cancelled. ²⁴

Finality of Decisions

Department of Defense

The Department of Defense has, without statutory authority, stated that the "contracting officers shall consider all protests or objections to the award of a contract, whether submitted before or after award." ²⁵ This statement provides the contracting officer with authority to render a protest decision; however, it provides no degree of finality to any decisions rendered by the contracting officer. The protestant is not bound by the contracting officer's decision and, if he chooses, may submit the protest to the Comptroller General for final determination.

Comptroller General

The Comptroller General appears to have final authority in rendering protest decisions. He claims the

²³Comptroller General Decision B-157150 (1966).

²⁴Comptroller General Decision B-161722 (1968).

²⁵Department of Defense, Armed Services Procurement Regulations, par. 2-407.9(a).

statutory authority to settle all claims and demands against the Government, as provided in the Budget and Accounting Act of 1921,²⁶ which provides an obligation to ensure that contracts involving public funds are legally made. It is within this framework of authority and obligation that the Comptroller General considers bid protests.

Enforcement of this authority is attained through the authority of the Comptroller General to withhold payment under the contract if his decision is not honored.²⁷ This is obvious in numerous decisions in which the Comptroller General states that a certain contract "would be considered improper by our Office and we would be constrained to apply this view in the audit of expenditures of appropriated funds under any contract for the services in question."²⁸

The Courts

It might appear that the courts would be the final authority on protest decisions; however, this is not necessarily true as the courts will normally not accept a bid protest for determination. There are numerous court rulings which reject bid protests at that level; the most well known is a Supreme Court ruling in which it is stated:

The interference of the courts with the performance of the ordinary duties of the executive departments

²⁶Budget and Accounting Act, 42 Stat. 24 (1921).

²⁷Ibid.

²⁸Comptroller General Decision B-161782 (1967).

of the Government would be productive of nothing but mischief and we are quite satisfied that such a power was never intended to be given to them.²⁹

This ruling, as well as others of a similar nature, substantiates the Comptroller General's claim to be the final authority in determination of bid protests. The Supreme Court obviously considers the consideration of bid protests to be an ordinary duty of the executive departments.

Although the courts do not render ordinary protest decisions, there is at least one instance in which the courts considered, not the protest, but instead, the decision previously rendered by the Comptroller General. In the case, the Comptroller General ruled the award was invalid and was to be cancelled with no relief to the awardee; however, the Court of Claims overruled the relief portion of the decision and declared the awardee was to receive relief as in a termination for convenience settlement.³⁰

The apparent conclusion is that the Comptroller General is the final authority to which a protest may be submitted; however, the courts may, in limited cases, review a decision and grant some relief of a quasi-contractual nature.

²⁹Perkins v. Luken Steel Co., 310 U.S. 113 (1939).

³⁰John Reiner & Co. v. United States, 163 Ct. Cl. 381, 325 F. 2d. 438.

Influence on Contract Award

Influence of protest decisions on contract award differs slightly between pre-award and post-award protests. These will be discussed separately; however, it can be noted that the influence is similar in certain respects.

Pre-Award

As mentioned previously, rendering a protest decision may take an average of seventy to eighty-four days if the decision is to be rendered by the Comptroller General. It is obvious that this action can have an impact of delaying contract award for a long period of time unless the contracting officer certifies applicability of the ASPR requirements which allow award.³¹

In the event the contract award is made under the ASPR criteria and the protest is denied, there is virtually no impact on the contract award. If, however, the contract is awarded and the protest is sustained after award, the influence may be considered the same as that of a post-award protest.

Pre-award protest decisions in which the protest is sustained may have varying degrees of influence. The decision may alter determination of the proper awardee and allow award to the next eligible bidder. The decision may pertain to defective specifications or to a defective

³¹Department of Defense, Armed Services Procurement Regulations, par. 2-407.9(b)(3).

invitation for bids and thereby force readvertisement and renegotiation of the contract prior to award.

Post-Award

Post-award protest decisions, although similar to pre-award decisions, appear to have a more serious influence or impact on contract award. A denied post-award protest has little, if any, impact on contract award unless a stop work order has been issued and the work halted pending determination of the protest; however, a sustained post-award protest may result in one of several alternatives relative to the awarded contract.

A decision which sustains a protest may also demand cancellation of an existing contract with or without reimbursement to the awardee. This appears to be the most serious aspect of a post-award protest decision. Such a cancellation may allow award to the next eligible bidder or may, if the specification or the invitation is defective, force readvertisement and renegotiation.

CHAPTER V

IMPACT OF BID PROTEST DECISIONS

The rendering of a protest decision by the General Accounting Office or by a Government contracting officer has a definite impact on all parties and programs concerned with the contract award. Of major importance is the impact on Government programs, the impact on the protesting party, and the impact on the contract awardee, in the event the decision is rendered after contract award. The impact on each of these will be discussed in this chapter.

Impact on Government Programs

The impact on Government programs is most appropriately discussed in terms of the time delay encountered in receiving final decisions, the cost impact resulting from a successful bid protest, and finally, the impact of General Accounting Office decisions on Government procurement regulations.

Time Delay

As discussed in Chapter IV of this paper, there is a long delay in receiving bid protest decisions. In a situation where a contract has not been awarded, but is being delayed until final protest determination, the

involved Government program may be halted unless the contracting officer determines that:

- (i) The items to be procured are urgently required; or
- (ii) Delivery or performance will be unduly delayed by failure to make award promptly; or
- (iii) A prompt award will otherwise be advantageous to the Government.¹

A situation of this nature has been related by the contracting officer of the Naval Ordnance Systems Command.² The procurement involved two separate contracts for two items which necessarily required "mating" and assembly at the second contractor's plant. The items formed a portion of a Navy torpedo. Award of one contract to manufacture one of the two parts and mate it with the other part when received was carried out. The other contract was protested and award subsequently delayed since the contracting officer did not feel he could at that time justify the requirements stated in the ASPR. The protest of one contract for one small item subsequently resulted in a delay of the entire torpedo assembly.

A secondary condition which may develop during the long time delay involves changing market conditions. Theoretically, a change in the cost of raw materials, contractor capability, and so on, could invalidate any data being utilized by the Government for determining the proper

¹Department of Defense, Armed Services Procurement Regulations, par. 2-407.9(b)(3).

²D. G. Aitken, U.S. Naval Ordnance Systems Command, Washington, D.C., interview, February, 1969.

awardee and could subsequently result in additional delays and increased costs.

Another, and probably more important, concept of the time delay aspect involves those relatively few cases in which a contract has been awarded only to have the General Accounting Office demand termination of the contract. At the point of termination a contracting officer may find it necessary to readvertise the invitation and start the process anew, causing an excessive delay.

A severe case of this nature is presently in process at the United States Naval Aviation Supply Office in Philadelphia, Pennsylvania. A contract for urgently required material was awarded and subsequently protested on the basis of nonresponsiveness. The protest was lodged with the contracting officer, who denied the protest in January, 1969.³ At that point the contract was less than one month old.

The unsuccessful bidder subsequently protested to the Comptroller General, who, in early March, 1969, after long deliberation, also denied the protest.⁴ At the end of March the Comptroller General indicated that he had reviewed the decision and was probably going to reverse the decision and demand cancellation of the contract.⁵ At the present

³Bartman, interview, March, 1969.

⁴Comptroller General Decision B-165792 (1969).

⁵Bartman, interview, March, 1969.

point in time, May, 1969, the final decision is still pending and the first item delivery is due in June, 1969.

If the Comptroller General demands termination of the contract at this time, a minimum of twelve months will have been lost in procuring an urgently required item. These twelve months include the six months which will have elapsed in addition to six months to return to the present position if another contractor gets the award.

Cost Impact

The cost impact on Government programs takes on an aspect of major importance in cases in which protests are sustained and contract cancellation demanded. Statistics indicate that in calendar years 1966 through 1968, the General Accounting Office demanded cancellation in only eleven of the bid protests considered; however, the eleven, in dollar amount, may represent a large impact on Government programs.

The protest discussed previously, involving the United States Aviation Supply Office, is an excellent example of the cost aspect of a cancellation resulting from a bid protest. Prior to rendering a decision, in March, 1969, the General Accounting Office received information stating that termination costs on the \$4,628,251.50 contract would be approximately \$420,000. This figure was computed to February 21, 1969.⁶

⁶Comptroller General Decision B-165792 (1969).

In an interview at the contracting agency on March 31, 1969, it was determined that termination costs then exceeded \$1 million.⁷ At this writing, May, 1969, the final decision has not been rendered; however, indications are that the contract very probably will be cancelled.⁸

Cancellation costs such as those mentioned above tend to result in not only more expensive procurements, but also a distortion in the budgeting process. At the inception of the contract period a given dollar amount is allocated to the contract, only to find several months later that the budget must be increased to provide funds necessary for termination and reprocurement.

Impact on Procurement Procedures

It is not uncommon, when reviewing Comptroller General decisions, to note many cases in which the Comptroller General requests or suggests changes to established procurement procedures as a result of bid protest decisions.

During the period July 1, 1967 through December 31, 1967, 206 bid protests resulted in 42 cases in which the Comptroller General recommended that agency procedures be improved.⁹

⁷Bartman, interview, March, 1969.

⁸Wade, interview, May, 1969.

⁹Senate, Select Committee on Small Business, Selected Problems of Small Business, p. 10.

In a protest decision relating to late proposals, the Comptroller General has stated:

Thus we are proposing really one change in the current procedure. Although the statute (2304[g]) does state that RFP's should advise "of the possibility that award may be made without discussion", we believe a more definite statement of intention is needed in solicitations in order to remove some of the uncertainty contained in the current procedure. . . .¹⁰

Actions of this nature may result in changed procurement procedures in some cases.

Impact on the Protestant

Bid protest decisions may result in the protestant's gaining his objective of forcing termination of an existing contract and subsequently receiving the contract award, or the protestant may force contract termination only to find himself in the position of third low bidder and subsequently fail to receive the award. A third, and more common, situation is one in which the protestant wins the protest decision, but in which no action is taken against an existing contract. The final situation is, of course, the denied protest.

Sustained Protest with No Contract Cancellation Demanded

Situations in which the protestant wins the decision but in which no action is taken against the existing contract appear to be most common. Statistics indicate that of the protests considered by the General Accounting

¹⁰Comptroller General Decision B-161782 (1967).

Office from fiscal year 1963 through 1966, thirty-one were sustained but the contract was cancelled in only ten of these cases.¹¹ More current statistics reveal that 1,299 bid protests were considered by the General Accounting Office between calendar years 1966 and 1968 and that of these, eighty-three were sustained. Only eleven of the eighty-three decisions demanded cancellation of an existing contract.¹² The result of these cases was that the protestant won the protest but lost the award. The usual reason behind a failure to demand cancellation appears to stem from the costs which may arise.

Typical of the situation related above is a particular Comptroller General decision in which it is stated that the "protestant was improperly denied the opportunity to effectively compete for the procurement. . . ."¹³ Although the protest was sustained, the Comptroller General further stated, "practical considerations preclude our disturbing the award. . . ."¹⁴ The protestant won the protest but did not receive an opportunity to win the award.

Another approach taken by the Comptroller General is to rule in favor of the protestant and make no comment regarding the existing contract. In a protest to the

¹¹Senate, Select Committee on Small Business, Selected Problems of Small Business, p. 10.

¹²Haycock, interview, May, 1969.

¹³Comptroller General Decision B-157150 (1966).

¹⁴Ibid.

Comptroller General by Cause Manufacturing Company, against Fab-Weld Corporation, the Comptroller General ruled in favor of Cause Manufacturing; however, he failed to make any reference to a possible termination of the existing contract.¹⁵ A situation of this nature gives the appearance of an incomplete decision and results in the protestant's winning a hollow victory.

Sustained Protest with Contract
Cancellation Demanded

Two situations may develop in this category. A protest submitted by a second low bidder may result in his receiving the subsequent reaward; however, many protests are submitted by a third low bidder and the protestant in that situation may not benefit from his protest.

A protest by Dayton Electronics Products against a contract awarded to Tridea Electronics illustrates the point. The Comptroller General sustained the protest and demanded contract cancellation but noted in the decision that the second low bidder and obvious candidate for award was Otis Elevator Company, who should receive award ahead of Dayton Electronics Products.¹⁶

Another situation which may be placed in this category is one in which a protest is sustained and contract cancellation demanded, with a stipulation that a new

¹⁵Comptroller General Decision B-154079 (1964).

¹⁶Comptroller General Decision B-161722 (1968).

invitation for bids be prepared. In cases of this nature the protestant is required to enter the process under new circumstances. The Comptroller General has indicated that a sustained protest in which the contract is cancelled, resulting from a defective invitation for bids, necessitates preparation of a new invitation prior to the re-award.¹⁷

Denied Protest

As indicated previously, the majority of protests are denied.¹⁸ The impact of a denied protest on the protestant may result in an ill feeling toward the Government procurement system if the protestant strongly believes his protest is valid. This aspect hinges on the motive of the protestant in protest submission.

If the protestant submits his protest in anticipation of future favoritism by the contracting officer, as suggested by L. R. Brown, a denied protest may satisfy him.¹⁹ There is no evidence to indicate favoritism by the contracting officer as a result of a denied protest; however, the protestant may still believe a denial is actually a success.

If the protestant's intent, in submission, is to influence procurement procedures, a denied protest may be scored a victory by the protestant if some change allows

¹⁷Comptroller General Decision B-142931 (1964).

¹⁸Haycock, interview, May, 1969.

¹⁹Brown, interview, May, 1969.

him to continue to submit bids using his own procedures, which have previously been considered nonacceptable.

In a protest by Unitec Industries against Bendix Field Engineering Corporation, Unitec submitted a late bid modification which was considered unacceptable by the contracting officer. The contracting officer did not conduct negotiations with Unitec prior to award to Bendix. The modification reduced the price to a level below that of Bendix. Although the Comptroller General denied the protest, he recommended a change to ASPR 3-805, relating to "Selection of Offerors for Negotiation and Award."²⁰ Depending on the protestant's intent he may have won even though his protest was denied because he will, in future transactions, be allowed to discuss similar late modifications with the contracting officer prior to award.

Impact on Contract Awardee

Protest decisions involving contracts awarded prior to protest submission, or contracts awarded after protest submission but prior to final determination, may have a strong impact on the contract awardee. The awardee may, for all practical purposes, be considered an innocent third party in the protest triangle and yet his interests are in jeopardy at inception of the protest. The impact on the awardee may be considered directly in terms of cost to the

²⁰Comptroller General Decision B-161782 (1967).

awardee. Other points of impact include scheduling and manpower requirements.

Cost Impact

The cost impact resulting from contract cancellation is of primary importance; however, another cost impact results from a stop work order issued after award but prior to final protest decision.

Contract cancellation

Contract cancellation may result in the awardee's receiving termination costs or in his receiving no reimbursement under the contract.

Cancellation with reimbursement.--Prior to 1963, contracts cancelled by the General Accounting Office, as a result of bid protest decisions, were considered void with no termination payment allowed.²¹ In 1963 the Court of Claims established a precedent in the case of John Reiner and Company vs. United States.²² A protest involving a defective invitation for bids had been sustained and an existing contract with John Reiner and Company had been subsequently cancelled with no termination settlement. Although the Comptroller General had ruled the contract void, the Court claimed it was not in fact illegal since

²¹Haycock, interview, May, 1969.

²²Supra, n. 30, chap. iv.

a responsible bid had been submitted in response to a defective invitation for bids, and the Court awarded John Reiner and Company \$17,000 termination costs. The Court indicated the costs were those of a termination for convenience settlement.²³

The major contribution of the John Reiner & Co. case appears to be the establishment of a precedent which recognizes that not all contracts cancelled as a result of a sustained protest are illegal, and consequently null and void, but may in fact be legal and require a termination for convenience settlement vice no termination settlement. Subsequent to the decision, the Comptroller General stated that, relative to termination settlements, "credit will not be allowed only when we are convinced that the agency has awarded a contract under standards which a court would find so incompatible with governing statutes and regulations as to render such contract a nullity."²⁴ The obvious indication is that not all cancelled contracts are clearly illegal, but may only be in violation of principle, and that an awardee, unless the contract is clearly illegal, will receive termination costs in the settlement of a cancelled contract.

Even obviously illegal contracts may provide reimbursement to the contractor in certain situations. A retention of benefits by the Government, in the form of

²³Ibid.

²⁴Comptroller General Decision B-142931 (1964).

goods and services, warrants a liability of the Government even in an illegal contract.²⁵ The retention of those benefits makes the Government liable for payment of the goods even though they were produced under an illegal contract.

Cancellation without reimbursement.--As noted previously, the awardee of a contract which is not clearly illegal may receive termination costs. Situations in which the contract is illegal but in which the Government has received benefits also result in certain reimbursements; however, except for these situations the awardee suffers a loss with no reimbursement.

The Comptroller General has charged that entering into a contract in good faith is not enough and that "contractors are charged with notice of all statutory and regulatory limitations on the contracting officer's actual authority and the Government is not estopped to assert such limitations even where a private contractor has relied on the contracting officer's apparent authority to his detriment."²⁶

Basically, a private contractor who in good faith enters into an obviously illegal contract with no resulting benefit to the Government stands to receive no payment of claims. This is exactly what resulted from a Triden

²⁵Prestex, Inc. v. United States, 162 Ct. Cl. 620, 320 F. 2d. 367.

²⁶Comptroller General Decision B-161722 (1968).

Electronics contract cancellation in which a stop work order was issued ten days after award and no benefits accrued to the Government.²⁷ Triden, after working on the contract for ten days, received no payment.

Another similar situation occurred when a contracting officer exceeded his authority and entered into an illegal contract with a bidder who was not the lowest responsive, responsible bidder. The contract was ruled illegal and no benefits had accrued to the Government. The Comptroller General ruled the Government would "pay nothing as termination settlement or otherwise."²⁸

Cost resulting from
a delayed decision

As discussed previously, a protest decision may take a long period of time. A contract awardee may receive a stop work order which will delay the contract performance. It is feasible to believe standby costs, in addition to an increase in raw material prices due to inflationary trends, may result in increased costs during the stop work order period. A situation of this nature tends to invalidate bid proposals relative to costs.

Impact on Scheduling

Scheduling problems logically arise in situations in which a stop work order is issued pending final protest

²⁷Ibid.

²⁸Comptroller General Decision B-142931 (1964).

determination and in situations in which an existing contract is cancelled. A contract delayed due to a stop work order results in a contractor's having a gap of indefinite duration in his production line. As the contractor does not know the point in time at which he may be allowed to proceed, he is not free to schedule other work during the standby period. In the event the contract is not cancelled, and the contractor is ordered to continue production under the contract, his entire production schedule may slip unless an acceleration order is issued. The situation may result in an impact on work other than that necessary under the protested contract.

Scheduling problems arising from a cancelled contract are similar to those above. The contractor may find himself in a situation in which he has scheduled work under the contract and suddenly has no contract. If the contractor has a backlog of work, the scheduling problem may be minor since he can accelerate his other contracts; however, if no backlog exists, the contractor may have no immediate work to fill the void. The degree of the impact will necessarily be in proportion to the size of the cancelled contract and extent of work completion under the contract at the time of cancellation.

Impact on Manpower Requirements

Delay of contract performance due to a stop work order may reduce the required manpower level; however, as the delay may be temporary, herein lies the conflict:

whether to retain all personnel in a standby capacity or to release a portion of the work force temporarily, pending an order to continue work under the contract.

Probably the most serious impact results when contract cancellation is demanded and the contractor has no backlog of work to justify retention of the complete work force. The result may be that the contractor will be forced to release a portion of his work force until replacement work can be acquired, at which time he will be forced to make additional expenditures to restaff all vacant positions. The degree of impact will necessarily be in proportion to the size of the cancelled contract and extent of work completion under the contract at the time of its cancellation.

CHAPTER VI

CONCLUSIONS

It has been demonstrated that there is a definite need for an avenue by which unsuccessful bidders for Government contracts can voice their objections to awards or proposed awards. This particular necessity has resulted, in part, from the actions of the Courts which have historically refused to hear and decide cases of the nature described.

The situation has resulted in the development of the bid protest concept in which an unsuccessful bidder may submit a protest to the contracting officer or to higher authorities when he believes established rules and regulations have been violated. Procedures for handling the bid protests have been developed by the Comptroller General and the Department of Defense as well as others. The Comptroller General appears to have statutory and final authority in determining bid protests while the Department of Defense appears to have no specific statutory authority and no final authority in the area.

In response to development of the concept, unsuccessful bidders appear to have made increasing use of the system. There are indications that the bidders' motives

are not always in harmony with those intended by the Government. Statistics indicate that a majority of all bid protests submitted are invalid; however, it has been demonstrated that the statistics do not necessarily provide a complete view of the situation.

Most protests submitted, although varied in basis, appear to fall into three major categories: protests against responsiveness, protests against responsibility, and protests resulting from ambiguity in the invitation for bids, the requests for proposals and quotations, and the specifications.

A very small portion of all bid protests appear to be submitted to the Comptroller General, who has final authority. Indications are that a vast majority of all bid protests are submitted to, and determination is rendered by, the contracting officer. Since the contracting officer's authority is not final, and the protestant may carry the protest to the Comptroller General level, it would appear that, in most cases, either the contracting officer's actions are satisfactory to the protestant or the protestant does not desire to pursue the protest further because of the fear of damaging good relations or the fear of becoming the object of prejudicial influence in future contract awards.

Procedures developed to process bid protests are vague, especially in the area of post-award protests, in

which almost no guidance is provided. The procedures relate primarily to those necessary for handling protests submitted to the Comptroller General. A minor conflict of authority appears to exist between the Comptroller General and the Department of Defense regarding cases involving pre-award protests submitted to the Comptroller General. The fact that the Department of Defense allows contracting officers to decide on protests without consulting the Comptroller General creates the conflict.

The applicable procedures provide no time frame within which to process protests, but instead require long, time consuming processes including submission of reports through numerous levels of the chain of command. This requirement results in processing time of as long as eighty-four days for rendering determinations at the Comptroller General level of authority.

Basic considerations for rendering bid protest decisions appear to be twofold. The obvious consideration is legality, based on applicable statutes and regulations; however, a second, and apparently more dominant consideration, is the interest of the Government. It has been shown that in certain situations improper awards have been sustained because it was not in the best interest of the Government to terminate the contract. The best interest of the Government normally relates to the time or money involved. Since protest determination is a process

conducted by the Government toward an action of the Government, the concept of best interest of the Government is a major factor in the determination.

Determinations of legality, on the other hand, are often difficult to make, due to the lack of standards against which to compare the award. This, it was noted, was especially true in the area of negotiated procurements.

The lack of standards against which to compare certain awards, in connection with the concept of the best interest of the Government, promotes a degree of inconsistency in protest decisions. It has been demonstrated that a protest may provide a victory for the protestant if the Government interest is not jeopardized, while a similar protest may be denied under circumstances which are costly to the Government in terms of time or money.

It has been demonstrated that protest decisions have an impact on contract award. The rendering of a protest decision, in pre-award protest cases, may result in delaying the involved procurement or in altering the proposed awardee. Pre-award protests may also result in the re-advertisement of a given procurement. Post-award protests may result in delaying the progress of work under the contract, or in cancellation of the contract with or without a termination settlement.

Protest decisions resulting from long delays in determination, and the basic considerations of legality

and best interest of the Government which determine the decision, create a definite impact on involved Government programs, on the protestant, and on the contract awardee, in the event a contract has been awarded prior to the rendering of the decision.

It has been the intent of this paper to explore the preliminary actions and procedures leading to final bid protest decisions and to evaluate certain decisions rendered in an effort to determine their impact on the involved parties. The major question to be answered concerns a determination of whether or not the procedures utilized in determining the protest ensure decisions that are fair and reasonable in terms of impact on the involved Government programs, the protestant, and the contract awardee. Webster's New World Dictionary defines fairness as the "treating of both or all sides alike without reference to one's own feelings or interests," and reasonableness as "amenable to reason; just."

Procedures for submission and determination of bid protests provide no boundaries concerning what may be protested. Virtually any unsuccessful bidder may protest any action relative to the award, and this tends to produce numerous invalid protests. Further, the procedures provide a built-in delay mechanism for determining protests. This delay is caused, in many cases, by the many levels of command that must review, report on, and approve action on

protests that are submitted to levels of authority higher than the contracting officer. The result of the numerous invalid protests and the long time delay in reaching a final protest decision is that a Government program may be unnecessarily delayed. Delay caused by invalid protests could certainly not be described by the definitions of "fair" and "reasonable."

The same time delay, when a valid protest is involved, can hold up a Government program for an unnecessarily long period. It has been noted that under certain conditions a contract award can be made prior to protest determination, but not all procurements meet these conditions and as a result are delayed. It is these procurements that are unnecessarily delayed by action which is neither reasonable nor fair.

The cost impact of bid protests on Government programs is of major concern. Protest procedures, which cause the time delay discussed above, also permit post-award protests, which may result in decisions that force contract cancellation. These procedures allow contract award prior to determination of a pre-award protest, and this aspect is similar to post-award protests.

The costs involved in cancelling and reawarding a contract can be staggering, and unnecessarily increase the cost of Government procurement. This aspect cannot be considered "reasonable."

It has been demonstrated that in only relatively few protests does the protestant win the protest decision and successfully force termination of an existing contract. This hollow victory probably has a major impact on the protestant.

It has been pointed out that protest decisions are rendered by the Government and pertain to Government actions. It has further been pointed out that the best interest of the Government is probably a more important aspect of a protest decision than is legality. It was noted that the procurement procedures state that actions relative to bid protests are, in many cases, to be determined by whether or not they are prejudicial to the Government.

Government interest in connection with the long period of time necessary to render a protest decision in many cases forces the awarding of a contract prior to determination; in other cases protests are not submitted until a contract award has been made. The result of these actions provides a situation in which a protestant wins the decision but cannot force contract cancellation because of the time and money cost to the Government. This is the hollow victory.

Since the definition of fairness refers to the treating of both parties alike and disregarding one's own interests, it would appear that the dominating Government interest relative to protest decisions makes the concept

grossly unfair. The term "reasonable" refers to being "just," which has connotations of legality and impartiality. These terms do not appear to fit well into a system in which Government interest is free to triumph over legality.

The contract awardee involved in a bid protest may normally be considered an innocent third party. The development of the awardee's unfortunate situation is due, in part, to the authority of the contracting agency to force the contractor to commence work on a protested contract prior to final determination. It is also due in part to the fact that the contracting officer may issue a stop work order if the existing contract contains a stop work clause. The resultant impact is that a contractor may be faced with a forced delay in contract performance or with cancellation of the contract, with or without reimbursement.

The fact that the awardee may be forced to readjust his production schedule for non-Government contracts and may be forced to accept the risk of increased material and labor costs due to a production delay on one Government contract would give the appearance of an unfair and unreasonable situation. During the period of protest determination the contractor is in a state of suspension. He may not be free to proceed under the contract; however, at the same time he is not free to accept new work under other contracts. This situation would appear to be unjust and unreasonable since the contractor may have had no part

in its development. He is, so to speak, a victim of circumstances.

Probably the most serious impact on an awardee results from a contract cancellation with no resulting reimbursement to the contractor. It has been demonstrated that even though a contractor enters into a contractual agreement in good faith he is charged with knowledge of the legality of the agreement. This situation, although unfortunate to the contractor, appears to be reasonable in intent. These situations appear to be extremely rare, however.

A problem arises even when a contract is cancelled and termination for convenience costs are paid to the contractor. In such situations the contract is not obviously illegal. It would appear that the noted inconsistency of protest decisions may have had some part in the development of the situation. The contractor who entered into the agreement may be faced with an idle plant and be forced to operate at a level below full capacity. The situation may develop even though the agreement is not obviously illegal, or is illegal to the extent that the contractor would be charged with a lack of knowledge. This situation can truly be called one in which the contractor's position as an innocent third party is jeopardized. This cannot be called reasonable or fair.

In summary, it appears that unsuccessful bidders, submitting protests to only the contracting officer level, feel that the decisions are fair and reasonable or fear future consequences resulting from protests carried to higher authorities. This view is supported by the low proportion of protests submitted to the higher levels, which have final authority. Consideration of protests determined by higher authorities reveals that, in many cases, the decisions are not fair and reasonable in terms of the impact on the involved parties. There is some indication that this dissension may result from two major problem areas: the longer time involved in processing protests submitted to higher authorities and the dominance of the best interest of the Government concept in protest determinations.

The results appear to promote a recommendation that Government procedures be revised to provide assurance that all involved parties will receive the most fair and reasonable treatment possible. Proposals relative to changing the existing system are discussed in the following chapter.

CHAPTER VII

RECOMMENDATIONS

As noted in the previous chapter, there is a definite need for some improvement in the manner in which bid protests are handled. It is the intent of this chapter to set forth certain recommendations which may assist in developing the bid protest concept into a meaningful process.

1. Define the problem.--There is a need to define the extent of the protest problem. Presently, no central agency or board has coordination control of all protest actions being conducted by the numerous decision rendering agencies, and as a result the extent of the problem can only be estimated.

It is recommended that a central coordinating agency or board be established to receive monthly procurement activity reports which set forth all protest actions filed and the disposition or status of each protest.

2. Published summary of protest cases.--As noted in the study, in many cases protests appear to be submitted for invalid reasons or purposes. This procedure tends to place an even greater burden on an already overburdened

system, thereby reducing the efficiency of the system. It can be expected that a large portion of the invalid protests result from the protestant's lack of knowledge of what is valid and what is not valid.

It is recommended that a summary of protest decisions, indicating the bases of both the protest and the decision, be published regularly and made available to all Government contractors. It is further recommended that the summary include invalid protests as well as valid protests. The source of this information is expected to be the report of monthly procurement activity discussed above.

3. Reduce authority to proceed with award.--As noted in the text, major protest injustices most often arise when protest decisions are rendered subsequent to contract award. It was further noted in the text that contracting officers could, under certain conditions, proceed with award prior to determination of a protest and the Comptroller General would not normally question the certificate of urgency once it was issued.

It is recommended that the conditions under which the contracting officer may proceed with award be tightened to allow only the most necessary awards to be made.

4. Establishment of authority and policy.--It was noted in the text that the contracting officer does not

appear to have statutory authority to render protest decisions and that the Comptroller General has interpreted his statutory authority to settle and adjust claims as being applicable to the situation. It becomes apparent that no statutory authority directly pertaining to bid protests has been established. This lack of statutory authority precludes the development of a clear, authoritative policy respecting protests.

It is recommended that Congressional action be taken to establish a decision rendering activity with full statutory authority, and that, simultaneously, a Congressional policy regarding protests be developed and issued in conjunction with the statutory authority. This action will necessitate a determination, at Congressional level, of what goals or objectives are desired from the protest concept.

5. Declaration of remedies.--Remedies available to the protestant who submits a valid protest appear to be vague and not necessarily consistent.

It is recommended that the development of a protest policy include a clear declaration of the exact remedies available to the protestant under various conditions.

The recommendations discussed above may not necessarily cure all ills of the system; however, their development and implementation could be a sign of progress in promoting a system which would be more fair and more reasonable, in terms of impact on all concerned parties, than the presently established system.

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